

ADDENDUM TO THE FINAL STATEMENT OF REASONS

Necessity:

- (a) The Department determined that it was necessary to amend its regulations prohibiting discrimination by replacing the term "handicap" with the term "disability" because the term "handicap" is no longer considered to be appropriate when referring to an individual with a disability. Additionally, the Department amended the regulation sections contained in this rulemaking file to provide consistency in the use of the terms relating to the prohibition against discrimination in licensing and certification.
- (b) It was necessary to amend departmental regulations to include the term "actual or perceived" sexual orientation. The Department determined that it was necessary to clarify that neither the Department nor foster family agencies may discriminate based on the perception of an applicant's sexual orientation. For example, it would be inconsistent to prohibit an agency from discriminating against an applicant who is gay, but at the same time allow that agency to discriminate against an applicant that it perceives as gay when in fact the person is heterosexual.

Augmentation to Response to Comments:

- (a) The commenter asserts that licensed adoption agencies are not subject to the Unruh Civil Rights Act. This point is moot because the only provision of the regulations that affect licensed adoption agencies is the provision prohibiting the Department from discriminating against applicants for an adoption agency license. The regulations do not address discrimination on the part of licensed adoption agencies.
- (b) The Department disagrees with the commenter's assertion that marital status and "actual or perceived" sexual orientation are not protected categories under the Unruh Civil Rights Act. The state has a legitimate interest in the placement of foster children in stable homes with qualified foster parents. Foster family agencies were created to reduce the number of children who were placed in group homes as opposed to foster homes. By allowing a licensed foster family agency to restrict its certification of qualified foster parents based on the applicant's marital status or actual or perceived sexual orientation reduces the number of available qualified foster parents. A reduction in the number of available foster parents would result in foster children having to stay longer in temporary non-family type placements such as shelters and group homes. Foster family agencies are subject to the Unruh Civil Rights Act and no appellate court has held otherwise. The Department is confident that a court of law would find the disparate treatment of qualified foster parents based on marital status and actual or perceived sexual orientation to be an impermissible distinction and violative of the Unruh Civil Rights Act.

- (c) The system of care for foster children in California is jointly funded and regulated by the federal government, the Department, each county's child welfare department, and by the juvenile courts. Children enter the foster care system because of abuse, neglect, or abandonment by their birth parents. Each county's child welfare department receives and investigates reports of child abuse or neglect, and, if necessary to protect the child, files a petition under Cal. Code Welf. & Inst. §§ 300 et seq. to have the child declared dependents of the juvenile court. Once a child is declared a court dependent, the county child welfare department is responsible for the child's care. The county fulfills this responsibility by placing the child in a foster home or group home licensed by the Department. If the child's birth parents do not succeed in reunifying with the child, the county child welfare department may petition the juvenile court under Cal. Code Welf. & Inst. § 366.26 for termination of parental rights, and then allow the foster parents, or other interested and qualified persons, to adopt the child. County child welfare agencies, to fulfill their duty to care for foster children, must recruit, train, supervise, and support foster families. Some county agencies contract with foster family agencies to assist them in recruiting, training, supervising and supporting foster families, and placing foster children with these families. See Cal. Code Health & Safety §§ 1502(a)(4)(defining "foster family agency"), 1506 (listing "foster family agency functions"). Although licensing of individual foster homes is a state government function, foster family agencies are permitted to "certify" foster families' compliance with departmental licensing requirements. Cal. Code Health & Safety § 1506(b)(1), (2) ("a foster family agency shall certify to the department that the home has met the department's licensing standards" and shall "issue a certificate of approval to the certified family home upon its determination that [the home] has met the standards established by the department and before the placement of any child in the home").

The funding of California's foster care system also involves close integration of federal, state and county agencies, and ostensibly agencies such as foster family agencies. The federal government, under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620 et seq. and §§ 670 et seq., provides funding to each state to assist with the costs of foster care; provides adoption assistance payments to families who adopt foster children; and extensively regulates state foster care systems. The department receives these funds from the federal government and disburses them, along with state funds, to foster family agencies as well as to each county's child welfare agency. Foster family agencies in turn disburse these federal and state funds as stipends to individual foster families, and also itself receives federal, state and county funds to cover its administrative costs. Thus, foster family agencies' role and function in the foster care system is closely integrated with that of the state and county agencies.

- (d) Assuming *arguendo* that foster family agencies are not subject to the Unruh Civil Rights Act, the Department has broad regulatory authority to regulate foster family agencies who perform a governmental function on behalf of the department. Foster family agencies contract with California counties to operate foster family agencies that recruit, train, certify, and provide ongoing services and support to foster families, and that place foster children with these families. Foster family agencies help to fulfill the legal duty of these counties to provide placement and care to foster children, and are licensed and regulated by the department. These agencies perform public functions, and are closely integrated and entwined with the state and county system of care for foster children. The Department also

disagrees with the assertion that foster family agencies are exempt from the Unruh Civil Rights Act because they are not a "business establishment." Foster family agencies receive government funding and perform a governmental function as described above. Therefore, foster family agencies do not fall within the definition of a "private institution." Also, the "right of intimate association" does not apply to the application or decertification process of foster family agencies or the application process of adoption agencies because these regulations do not affect placement decisions.